

C O M M E N T A R Y

Antitrust in the O'Connor-Rehnquist Era: A View from Inside the Supreme Court

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THE EFFORT TO TAKE STOCK OF the Supreme Court's antitrust jurisprudence during the tenures of Sandra Day O'Connor and William Rehnquist benefits from a unique circumstance. The release of the papers of several Justices who served with O'Connor and Rehnquist has afforded researchers unusually quick access to the Court's recent internal deliberations. From the papers of Harry Blackmun, Thurgood Marshall, and Lewis Powell, we can develop the more complete interpretation of events that in the past has taken place only decades after the retirements or deaths of the Justices from a specific period.

This article examines the Supreme Court's treatment of antitrust cases in the O'Connor-Rehnquist era in the light of materials included in the papers of their colleagues. The article focuses on the Court's internal deliberations in three cases.¹ In the first case, the internal records solve a puzzle by explaining why the Court so strongly endorsed the application of a per se rule to condemn a horizontal restraint in *Arizona v. Maricopa County Medical Society*² three years after it had called for a more discriminating inquiry for such arrangements in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*³ In the second case, the papers help explain the formation of the majority coalition in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁴ where Justice Marshall joined the 5–4 majority in one of the era's strongest pro-defendant decisions. In the third case, the Justices' files illuminate the intellectual tensions that surfaced in cases such as *Jefferson Parish Hospital District No. 2 v. Hyde*,⁵ where the majority and concurring opinions debated the legal test for tying arrangements.

Maricopa: Justice Powell's Bridge Too Far

In the late 1970s, in *National Society of Professional Engineers v. United States*⁶ and *Broadcast Music, Inc. v. CBS, Inc.*,⁷ the

Supreme Court undertook a major reinterpretation of the rule of per se illegality it established in *United States v. Socony-Vacuum Oil Co.*⁸ for price and price-related agreements by direct rivals. *BMI* expressly recognized what had been implicit in horizontal restraints cases since *Socony*: it was impossible to apply a per se ban against horizontal price fixing without first deciding whether to characterize the conduct at issue as "price-fixing." As applied in later horizontal restraints decisions, *BMI*'s characterization exercise has given defendants an opportunity to offer justifications that warrant a fuller assessment of inherently suspect behavior.⁹

In *Maricopa*, the Court raised questions about what it had intended to accomplish in *BMI* three years earlier. Justice John Paul Stevens's opinion for the 4–3 majority rejected the arguments of the defendant physicians that *BMI* precluded summary condemnation of their agreement to set maximum fees. Reviewing its earlier horizontal restraints jurisprudence, the Court majority said "[w]e have not wavered in our enforcement of the per se rule against price fixing."¹⁰ Calling *BMI* a "fundamentally different" case, the Court classified the fee schedules as per se illegal price fixing and rejected the defendant's argument that the arrangements were "price fixing in only a literal sense" and therefore were amenable to a fuller inquiry.¹¹

For years, commentators have wondered how to square *Maricopa* with *Professional Engineers*, *BMI*, and later decisions, such as *NCAA v. Board of Regents*,¹² where the Court seemed to discourage the view that a bright analytical line separated per se condemnation and a fuller study of horizontal restraints. As he had done in *Maricopa*, Justice Stevens authored the opinion for the Court in *NCAA*, yet the two decisions appeared to use different analytical models and display different philosophies about the treatment of agreements among competitors.¹³ What accounted for the variation in perspectives?

The papers of the Justices provide a likely answer. *Maricopa* came to the Court on a petition for certiorari from a Ninth Circuit decision that had affirmed the district court's denial in 1979 of the State of Arizona's motion for summary judgment on the issue of liability.¹⁴ The Arizona Attorney General, who had asked the district court to condemn the agreement as per se illegal horizontal price fixing, sought cer-

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tiorari, and the Supreme Court granted the petition in 1981.¹⁵ In their initial deliberations after case had been briefed and argued, a majority of the Court's seven participating members¹⁶ seemed inclined to dismiss certiorari as improvidently granted or to remand the matter to allow the district court to assemble a more complete factual record for deciding what liability standard to apply. The remand option appeared to command four votes (Chief Justice Warren Burger and Justices Powell, Rehnquist, and Byron White), and the Chief Justice asked Justice Powell "to draft a dispositive per curiam opinion." Burger and Powell agreed that Powell would not draft a "full opinion," and the Chief Justice advised Powell to "keep it short."¹⁷

Powell ignored Burger's advice. Seeing a need to give the district court judge broader guidance on how to interpret the three opinions in the Ninth Circuit decision, Justice Powell circulated a 15-page, single-spaced memo printed in the form of the Court's slip opinions. Powell's memo emphasized that *Continental T.V., Inc. v. GTE Sylvania Inc.*¹⁸ and *BMI* had cautioned against reliance on per se liability rules and had called for a more elaborate inquiry into many business practices.¹⁹ To Powell, the per curiam opinion may well have seemed to be an opportunity to carry Section 1 doctrine and policy a step further away from reliance on what he regarded to be improperly rigid bright line prohibitions.²⁰

Powell miscalculated how his colleagues would react to his attempt to offer more elaborate guidance (and to restate the recent path of the Court's analysis). His 15-page memo transformed what might have been a relatively unnoticed remand into a struggle within the Court. Two days after Powell circulated his paper, Justice Stevens responded to oppose what he regarded to be an unacceptable erosion of the per se rule:

The analysis in your memorandum is somewhat puzzling. If the maximum price fixing arrangement is illegal per se—as I believe it is—I do not understand how any of the three justifications can save it. If you are saying that an arrangement is not a "price fixing" agreement that deserves per se condemnation if the participants are motivated by any purpose except stifling competition, not much will remain of the per se doctrine. In any event, I intend to adhere to the position I took in Conference and will be writing in dissent as soon as I can.²¹

The Stevens "dissent" attracted the votes of Justices William Brennan, Marshall, and White, who had written for the Court in *BMI* and who had voted in the Justices' conference on *Maricopa* to remand the case for further factual development and to express no view about the legal test to be applied.²²

Powell not only had failed to command a majority to support his per curiam memorandum, but he had raised the stakes. There would be no simple remand. Instead, his draft memo galvanized Stevens, Brennan, Marshall, and White to overturn the Ninth Circuit's decision. By a 4–3 vote, the Court did so. Justice Powell's 15-page draft per curiam mem-

orandum became the foundation for his dissent, which the Chief Justice and Justice Rehnquist joined.

The reversal of fortune in *Maricopa* rankled Powell for years to come. During the Court's deliberations in *Matsushita*, he wrote to Rehnquist and said "the Court's 4–3 decision in [*Maricopa*] could well be the most erroneous antitrust decision the Court has ever made."²³ The evident irritation in this comment reflects not only Powell's dismay at the substance of *Maricopa* but perhaps unspoken second thoughts about his choice of strategies in drafting the per curiam memo. By spurning the Chief Justice's admonition to "keep it short," Justice Powell lengthened the journey to the doctrinal ends first had set out to achieve in *Sylvania*.²⁴ Perhaps he succumbed to impatience in wanting to continue the delimitation of per se tests in antitrust law and, unable to predict with confidence that later matters (e.g., *NCAA*) would give the Court better means to reach this goal, decided to press on with the case at hand.

Matsushita: The Switch that Changed the Nine

As surprising and distasteful as the outcome in *Maricopa* was for Justice Powell, the result in *Matsushita* was surprising and satisfying. Confronted with strong competition from Japanese television producers,²⁵ Zenith Radio Corporation and other American-based plaintiffs filed antitrust and antidumping lawsuits in the mid-1970s against *Matsushita* and other Japanese firms and alleged that the defendants conspired to set predatorily low prices in the United States and to fund losses from below-cost prices in the United States by charging supracompetitive prices in Japan.

After several years of extensive discovery, the district court granted the defendants' motion for summary judgment,²⁶ mainly on the ground that the evidence supported no justifiable inferences of conspiracy. The U.S. Court of Appeals for the Third Circuit reversed,²⁷ and concluded that the evidence could support a finding of conspiracy. By a 5–4 vote, the Supreme Court reversed the Third Circuit's decision. Justice Powell wrote for the Court and was joined by Chief Justice Burger and Justices O'Connor, Marshall, and Rehnquist. Justices Blackmun, Brennan, Stevens, and White dissented.

Matsushita has strong claim to be the most important antitrust decision issued by the O'Connor-Rehnquist court in the 1980s. It transformed antitrust analysis in three significant ways. First, *Matsushita* demonstrated that summary judgment was an appropriate means for lower courts to dismiss antitrust claims.²⁸ Since *Matsushita*, lower courts have granted defendants' motions more willingly and, by making the plaintiffs' journey to the jury more difficult, the wider availability of summary judgment has improved the litigation position of defendants in antitrust cases.

Matsushita also raised the evidentiary bar that plaintiffs must clear to establish the fact of concerted action based on circumstantial proof. Building on its analysis of agreement issues in vertical conspiracy cases,²⁹ *Matsushita* curbed the inferences to be drawn from ambiguous circumstantial evi-

dence of horizontal collaboration. This concept of *Matsushita* has migrated in the lower courts from its originating context—an alleged horizontal conspiracy to set prices below cost—to preclude juries from considering conspiracy claims where the proof of conspiracy to set higher prices is as consistent with independent action as with collective behavior.³⁰

Matsushita's third legacy was to raise the bar that plaintiffs must clear to establish liability for predatory pricing. *Matsushita* drew attention to the structural conditions that will permit a defendant to recover its investment in below-cost sales and foreshadowed the Court's adoption of the recoupment test in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*³¹ *Matsushita* also increased the resistance of courts to find antitrust liability predicated on predatory pricing.³²

Justice Marshall's papers reveal that the 5–4 outcome for the defendants hinged upon a switch in Marshall's vote. After the Third Circuit reversed the district court's grant of summary judgment in 1983, the defendants filed a petition for certiorari with the Supreme Court. For a certiorari petition to be granted, four members of the Court must vote to accept the case. Justices Blackmun, Marshall, Powell, and Rehnquist voted to hear the case, and the Court granted certiorari on April 1, 1985.³³ Opposing the grant of certiorari were Chief Justice Burger and Justices O'Connor, Stevens, and White. Justice Brennan also appears to have voted to deny certiorari but also recommended that the Court seek the Solicitor General's views about whether to hear the case.

The Court soon had second thoughts about taking the case. The dispute's factual complexity and vast record seemed daunting. On June 3, 1985, Justice White wrote to his colleagues about the logistical difficulties of reviewing the decision below:

The Record in the Court of Appeals consisted of 44 volumes of photocopied materials. [Matsushita] asserts that each volume contained about 500 pages. [Zenith] claims that there were 18,780 pages in the entire record. The Court of Appeals permitted 600 pages of briefs and heard argument for two days. The case was and is heavily fact-bound; the evidence will be argued at length.³⁴

By mid-June, other Justices seemed to agree that the case was "factbound" and unsuitable as a means for stating principles of general application. In a meeting on June 13 and in correspondence, the Justices considered whether to "dismiss certiorari as improvidently granted" ("DIG").³⁵ Fearing that a DIG might confuse observers about the change of direction, the Court proceeded to hear the case.³⁶

Oral argument took place on November 12, 1985. A vote among the Justices soon after oral argument yielded five votes (Blackmun, Brennan, Marshall, Stevens, and White) either to affirm the Third Circuit or to DIG the case.³⁷ Either outcome would have constituted a victory for the plaintiffs by leaving the Third Circuit's decision in place. By the week's end, however, the alignment of votes shifted. By letter of November 15, 1985, Justice Marshall told Chief Justice Burger that "I have carefully reexamined my position in this

case and would like to change my vote from Affirm to Reverse."³⁸ Informed of Marshall's switch by Burger, Justice Powell began to draft an opinion for a majority that included Burger, Marshall, O'Connor, and Rehnquist. On March 26, 1986, the Court released its decision, reversed the Third Circuit, and infused key elements of antitrust doctrine with non-interventionist preferences.

Well before the release of the Justices' papers, Justice Marshall's votes in antitrust cases had intrigued and, to some extent, perplexed antitrust Court watchers. On social issues, Marshall ordinarily cast liberal votes, and one might have assumed that Marshall's liberalism would tend to favor expansive antitrust intervention to protect comparatively weaker individuals and commercial entities from oppression by stronger institutions. At times, Marshall reflected the liberal antitrust orthodoxy of the Warren Era Supreme Court. For example, Marshall was a fairly reliable pro-enforcement vote when a government body appeared as plaintiff.³⁹

Things changed when the antitrust plaintiff was a private party. From the mid-1970s onward, Marshall often rebuffed private plaintiffs. In 1977, Marshall's opinion for a unanimous Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*⁴⁰ required private plaintiffs to prove "antitrust injury" to obtain treble damages. In a powerful departure from the egalitarian antitrust jurisprudence of the Warren Era, *Brunswick* supplied the much-quoted observation that "[t]he antitrust laws . . . were enacted for the 'protection of *competition*, not *competitors*.'"⁴¹

In later cases, Marshall voted to extend *Brunswick*'s application and toughen evidentiary standards that plaintiffs must satisfy to establish antitrust liability.⁴² An outsider might explain Marshall's vote in *Matsushita* as simply another manifestation of his skepticism toward private antitrust enforcement. Marshall's papers indicate that Marshall's decision to switch his vote in *Matsushita* probably resulted from more than the Justice's doubts about private antitrust litigation. Without some additional intervening factor, Marshall likely would have remained part of a five-vote majority to dismiss the appeal and let stand the court of appeals decision for the plaintiffs.

Marshall's papers suggest two possible additional reasons for his change of mind. The first is that Marshall was persuaded to alter his vote as a result of discussions with colleagues who wanted to reverse the Third Circuit.⁴³ The papers of the Court's members suggest that Justices often exchanged views about individual cases in writing and in conversation.⁴⁴ One or more Justices may have sought to persuade Marshall in writing to change his vote, but Marshall's chambers did not preserve the letters. It is also possible that one or more of Marshall's colleagues may have urged him in conversations to switch sides.

Another possibility is that Marshall changed his vote because one of his law clerks convinced him to do so. There is considerable debate in the literature concerning the Justices' papers about how much the law clerks influence the think-

ing and votes of the Justices.⁴⁵ On the one hand, law clerks sometimes express strong preferences concerning cases and vigorously advance these views in chambers. For example, in the Fall of 1991 the Court considered whether to grant certiorari in the matter ultimately decided as *Spectrum Sports, Inc. v. McQuillan*⁴⁶ and evaluate the vitality of the attempted monopolization standard first adopted by the Ninth Circuit in *Lessig v. Tidewater Oil Co.*⁴⁷ One of Justice Blackmun's law clerks wrote a memo for Blackmun expressing doubts about taking the case. After discussing the substance of the decision below and its use of *Lessig*, the law clerk commented upon the wisdom of taking the case in view of how the Court, particularly in view of the preferences of three Justices (Antonin Scalia, Sandra Day O'Connor, and Clarence Thomas), would resolve the case on the merits:

In addition, I think a grant in an antitrust case is almost never wise. There are three votes here (AS, SOC, CT) that basically think that plaintiffs should never win under the Sherman Act. A grant only on the *Lessig* issue seems narrow enough to be fairly harmless, but one never knows. The scrambling in AS's chambers to find any way to decide against the ISO's in *Kodak*, including what I hear will now be an entire dissent written on an issue that was not briefed and would create a new rule broadly prohibiting liability, makes me nervous about any grant in the antitrust area.⁴⁸

In a separate memo written the following year during the Court's deliberations in the *Kodak* case (*Eastman Kodak Co. v. Image Technical Services, Inc.*⁴⁹) mentioned in the passage above, memos prepared by the same law clerk express satisfaction with Justice Blackmun's success in attracting a majority to find liability.⁵⁰

On the other hand, the significance to be attributed to such observations can be uncertain. It can be difficult to tell how much a clerk's views merely reflected the existing preferences of the Justice or, if they varied from the Justice's prior preferences, caused the Justice to change direction. It is still more challenging to detect whether, or how much, in an individual matter a member of the court relied on a clerk to formulate the approach that the Justice would take in considering the case.

In *Matsushita*, there is evidence to suggest that a law clerk's views had an important impact on the resolution of the case. Justice Marshall's papers contain a bench memorandum written by a law clerk to prepare Marshall for the oral argument in *Matsushita* that occurred on November 12.⁵¹ The bench memo belittled the plaintiffs' claims. Using a line of reasoning presented in the defendants' briefs, and ultimately reflected in Justice Powell's opinion for the Court, the bench memo focused on the economic plausibility of the plaintiff's conspiracy theory:

I think it is impossible to analyze this case without first reflecting on the staggering implausibility of [Zenith's] theory. In essence, that theory is that [the defendants] have been patiently losing money . . . for the last twenty years, in hopes of some day driving all the American manufac-

turers out of the market and enjoying a monopoly—and maintaining that monopoly in the largest and most competitive consumer market in the world, long enough to recoup twenty-plus years' worth of losses. There are so many holes in that theory I won't even bother to discuss them at length. Suffice it to say that [the plaintiffs] have not even suggested how [the defendants] could possibly keep twenty or more Japanese manufacturers from "cheating" on the low-price cartel by trying to get everyone else to absorb the losses, or how they will prevent cheating when they get a monopoly, or how they will prevent new competitors from entering the market as soon as they get a monopoly.⁵²

The bench memo went on to recommend that Marshall vote to reverse the court of appeals.

At first Marshall rejected the law clerk's recommendation. Soon after the oral argument, Marshall participated in the Court's conference and voted to affirm the court of appeals or dismiss certiorari as improvidently granted. By the week's end, on November 15, Marshall informed Chief Justice Burger that he had changed his mind and asked to be recorded as voting to reverse. It is possible that the law clerk who wrote the November 7 bench memo continued to discuss the case with Marshall and eventually convinced him that the plaintiffs' antitrust claims were economically unsustainable. In conversations or memos, the clerk may have revisited, and persuaded Marshall to accept, the arguments presented in his original bench memo.

Jefferson Parish: Stare Decisis and the Design of Legal Rules

Judges perceive limits on their ability to repudiate or abandon rules derived from earlier court decisions. At a minimum, the principle of stare decisis can discourage frontal assaults even upon well-established rules whose wisdom has been questioned.⁵³ The Justices' papers show that even the Court's most conservative members, during deliberations in 1988 over *Business Electronics Corp. v. Sharp Electronics Corp.*,⁵⁴ disavowed any aim to overturn the much-criticized rule of per se illegality for resale price maintenance adopted in 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁵⁵ Asked by Justice Brennan about his draft opinion for the Court majority,⁵⁶ Justice Scalia assured Brennan that "[i]t was not my intent to use this opinion to call Dr. Miles into question."⁵⁷

At the same time, the Court in the O'Connor-Rehnquist era vigorously debated the value of adhering to longstanding precedents, including those that involved the definition and application of per se rules of liability. The Court's deliberations in *Jefferson Parish* featured disagreement over the desirability of the per se rule against tying. Justice O'Connor corresponded extensively with Justice Stevens, who authored the majority opinion in the case. O'Connor unsuccessfully urged Stevens to abandon the "per se" standard of earlier Supreme Court tying decisions in favor of a new rule of reason analytical framework. In one memorandum, O'Connor summarized her proposed standard:

I must emphasize that I would not apply a “per se” approach in any circumstances. If that does not come through in my draft, I will offer appropriate changes. I have tried to make clear that the three conditions I describe are merely threshold conditions, necessary, but not sufficient, to establish harmful economic effects from the tie. It is only when the three conditions are met that a further inquiry into economic impacts is required under the Rule of Reason. My “different label,” in other words, is intended to go with a different mode of analysis. The purpose of the threshold conditions is to avoid the lengthy and cumbersome processes of a trial if it is unnecessary.⁵⁸

Chief Justice Burger and Justices Powell and Rehnquist also wrote letters opposing the continued application of a per se rule to tying.⁵⁹ Stevens rejected suggestions that the Court repudiate the per se test for tying and emphasized fidelity to past Court decisions using the per se nomenclature.⁶⁰ O’Connor ultimately concurred in the judgment of the Court denying liability in *Jefferson Parish*, but she wrote a separate opinion calling for replacing the per se analytical framework with a structured rule of reason.⁶¹ She also disputed the majority’s apparent use of a presumption that the existence of a patent gives the patent holder monopoly power for purposes of tying analysis.⁶²

At the time, O’Connor’s concurrence attracted only the votes of Burger, Powell, and Rehnquist. Yet her arguments would resonate over time, even with Justice Stevens. Twenty-two years after *Jefferson Parish*, the court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*⁶³ revisited one issue that O’Connor had raised in her *Jefferson Parish* concurring opinion—the presumption that a patent gives the patent holder substantial market power for purposes of tying analysis. In a unanimous decision that quoted favorably from Justice O’Connor’s analysis in *Jefferson Parish*, the Court concluded that the existence of a patent creates no presumption of market power.⁶⁴ The author of the Court’s opinion was Justice Stevens, who pointed to a consensus among commentators, the enforcement guidelines of the federal antitrust agencies, and changes in congressional preferences as bases for abandoning a principle that the Court had endorsed in *Jefferson Parish*.⁶⁵ This episode indicates how future litigants might use similar sources—adjustments in federal enforcement policy, trends in academic commentary, and policy signals from Congress—to persuade the Supreme Court to revisit and alter earlier interpretations of the antitrust laws, including, perhaps, what remains of the per se ban on tying itself.

Even when the Court feels bound to follow precedent, the Justices retain discretion to develop principles that limit the reach of nominally expansive liability rules. A number of decisions in the O’Connor-Rehnquist era softened the impact of facially draconian substantive rules by adjusting evidentiary, standing, and antitrust injury requirements that private plaintiffs must satisfy. For example, in *Atlantic Richfield Co. v. USA Petroleum Co.*⁶⁶ and *Business Electronics Corp. v. Sharp Electronics Corp.*,⁶⁷ the Court endorsed the per se ban on resale price maintenance schemes yet also manipulated doctrines

involving antitrust injury (*Arco*) and the evidentiary test for proving a price maintenance agreement (*Sharp*) to deny recovery to plaintiffs seeking to invoke per se liability rules.

Conclusion

In *Maricopa*, *Matsushita*, and *Jefferson Parish*, the papers of the members of the Supreme Court provide informative perspectives on the Court’s treatment of antitrust matters during the O’Connor-Rehnquist Era. Each episode sheds new light on the development of modern antitrust jurisprudence and enriches our understanding of the process of judicial decision making.

In *Maricopa* the Justices’ papers display how the strategic judgments and tactics of individual Justices can determine the timing of the Court’s decision to treat specific substantive issues and introduce anomalies into the elaboration of antitrust doctrine. For a short time, *Maricopa* was destined to disappear from the Court’s docket as a potentially inconsequential remand, accompanied by terse guidance to the district court about developing a fuller factual framework to analyze the challenged restraint. Instead of drafting brief instructions, Justice Powell prepared an elaborate restatement of the Court’s efforts in the late 1970s to curtail the application of per se rules in antitrust analysis. In doing so he set off a struggle that yielded a decision on the merits and a reaffirmation of the benefits of per se prohibitions.

The papers relating to *Matsushita* suggest how law clerks can influence the Justices’ analysis of and voting in individual matters. At the conference of the Justices following the oral argument in *Matsushita*, the Court initially voted to give the plaintiff television manufacturers an important victory. The triumph soon evaporated. A 5–4 victory became a 5–4 defeat and a landmark triumph for antitrust defendants because Justice Marshall changed his vote. It is impossible to know with certainty why Marshall changed his mind, but the Justices’ papers suggest that Marshall’s law clerk played an important part in leading the Justice to rethink the case. This possibility suggests that a careful review of the law clerk’s academic and professional background sometimes may provide useful clues about how a court will go about evaluating the parties’ arguments.

The materials in *Jefferson Parish* indicate the importance the Court attaches to precedent in resolving antitrust disputes but also provide some guidance about what advocates must do to persuade individual Justices to adjust the doctrinal defaults set by decisions decades ago. As a comparison of published decisions in *Jefferson Parish* and *Independent Ink* indicate, the papers of the Justices suggest the importance of demonstrating to the Court how its jurisprudence lags behind widely accepted perspectives in the legal and economic literature and public enforcement policy. ■

¹ The article draws upon research presented in ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES,

- CONCEPTS AND PROBLEMS IN COMPETITION POLICY 114–17, 266–67, 370–73, 707–08 (2002) [hereinafter ANTITRUST LAW]; William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, 42 ANTITRUST BULL. 93 (1997). The choice of cases complements Andrew Gavil's detailed treatment of the Court's modern vertical restraints jurisprudence, see Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 8, and his examination of the Court's deliberations in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), see Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 533 (2005).
- ² 457 U.S. 332 (1982).
- ³ 441 U.S. 1 (1979).
- ⁴ 475 U.S. 574 (1986).
- ⁵ 466 U.S. 2 (1984).
- ⁶ 435 U.S. 679 (1978).
- ⁷ 441 U.S. 1 (1979).
- ⁸ 310 U.S. 150 (1940).
- ⁹ See *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 33–35 (D.C. Cir. 2005) (discussing modern evolution of Supreme Court horizontal restraints jurisprudence); see also Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165 (1988) (per se rule against price fixing forecloses consideration of specific justifications that Supreme Court decisions have classified as unacceptable).
- ¹⁰ *Maricopa*, 457 U.S. at 347.
- ¹¹ *Id.* at 355.
- ¹² 468 U.S. 65 (1984).
- ¹³ See ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 220–21, 230–31, 235–36 (5th ed. 2004) (describing analytical tensions between *Maricopa* and NCAA).
- ¹⁴ *Arizona v. Maricopa County Med. Soc'y*, 643 F.2d 553 (9th Cir. 1980). The 2–1 Ninth Circuit majority said a new trial was necessary to collect and assess evidence concerning the purpose and effect of what it deemed to be a new form of fee-setting arrangement. Judge (later Justice) Anthony Kennedy's concurring opinion said more facts were needed to evaluate the restraint.
- ¹⁵ 450 U.S. 979 (1981).
- ¹⁶ Justices Blackmun and O'Connor did not participate.
- ¹⁷ GAVIL ET AL., ANTITRUST LAW, *supra* note 1, at 115.
- ¹⁸ 433 U.S. 36 (1977).
- ¹⁹ GAVIL ET AL., ANTITRUST LAW, *supra* note 1, at 116.
- ²⁰ Such an interpretation is consistent with Powell's conscious pursuit of Section 1 doctrinal reform in the Court's deliberations in *Sylvania*. See Gavil, *Powell Papers*, *supra* note 5, at 9–11 (describing Justice Powell's determination in *Sylvania* to overrule per se ban established in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).
- ²¹ GAVIL ET AL., ANTITRUST LAW, *supra* note 1, at 116.
- ²² For Powell, the least expected and most dismaying of these votes was White's, which was revealed to Powell in a memorandum from White dated April 26, 1982 (contained in Box 122, Folder 9, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress). White previously had endorsed the idea of a remand and, as the author of the majority opinion in *BMI*, had appeared to Powell to be amendable to the approach presented in Powell's draft per curiam opinion.
- ²³ GAVIL ET AL., ANTITRUST LAW, *supra* note 1, at 116.
- ²⁴ See *supra* note 10 (describing Powell's aims in *Sylvania*).
- ²⁵ See Kenneth G. Elzinga, *Collusive Predation: Matsushita v. Zenith*, in THE ANTITRUST REVOLUTION 241 (John E. Kwoka, Jr. & Lawrence J. White eds., 1989).
- ²⁶ *Zenith Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). The district court's opinion covers over 200 pages in the *Federal Supplement*.
- ²⁷ 723 F.2d 238 (3d Cir. 1983).
- ²⁸ As such, *Matsushita* steered lower courts away from reliance on *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 491 (1962), where the Court had said summary disposition was disfavored in antitrust disputes in which motive and intent are significant factors.
- ²⁹ *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).
- ³⁰ For a vivid illustration of this extension, see *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000).
- ³¹ 509 U.S. 209 (1993).
- ³² See Susan S. DeSanti & William E. Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 ANTITRUST L.J. 609 (1991).
- ³³ The vote on the certiorari petition is noted in a bench memorandum by one of Justice Marshall's law clerks for the oral argument in the case. See Bench Memorandum, *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, No. 83-2004 (Nov. 7, 1985), reproduced from Box 375, Folder 4, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.
- ³⁴ Byron R. White, Memorandum to the Conference Re: 83-2004—*Matsushita v. Zenith* (June 3, 1985), reproduced from Box 355, Folder 8, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.
- ³⁵ In a memo on June 22, Justice Powell said the antitrust conspiracy question “is extremely factbound, and would require us to consider a long and complex record.” Powell added that “[a]ny decision we made would have little or no applicability to future cases in which the facts were different. To the extent it is argued that there is a conflict, I doubt that we could resolve it on the basis of the factual record.” Lewis F. Powell, Jr., Memorandum to the Conference, 83-2004—*Matsushita Electric v. Zenith Radio Corp.* (June 22, 1985), reproduced from Box 355, Folder 7, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. See also John Paul Stevens, Letter to the Chief Justice Re: 83-2004—*Matsushita Electric v. Zenith Radio Corp.* (June 24, 1985) (“If a vote is taken at the Conference tomorrow morning on Bill Brennan's motion to DIG our grant of cert in this case, I vote in favor of the motion.”), reproduced from Box 355, Folder 7, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.
- ³⁶ See Warren E. Burger, Memorandum to the Conference Re: 83-2004—*Matsushita Electric Industrial Co., Ltd., et al. v. Zenith Radio Corporation, et al.* (June 25, 1985) (“With four others, I voted to deny cert. Now that four wish to be shown on the public record that they wish to hear the case, the explanation for this phenomenon will never be understood. I resolve it by voting now to DENY the motion to vacate the grant of certiorari.”), reproduced from Box 355, Folder 7, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.
- ³⁷ See Lewis F. Powell, Jr., Letter to the Chief Justice Concerning 83-2004—*Matsushita Electric v. Zenith* (Nov. 18, 1985), reproduced from Box 377, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. Powell's November 18 letter suggests that the provisional five-member majority had agreed that “Bill Brennan would write a brief explanation of why the Court was dismissing the case as improvidently granted.” Powell reported that he told Brennan that he would not write a dissent, “given the five votes to dismiss.”
- ³⁸ Thurgood Marshall, Letter to the Chief Justice Re: No. 83-2004—*Matsushita Elec. v. Zenith Radio* (Nov. 15, 1985), reproduced from Box 377, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.
- ³⁹ See Victor Kramer, *The Road to City of Berkeley: The Antitrust Positions of Thurgood Marshall*, 32 ANTITRUST BULL. 335, 341, 350–53, 361–64 (1987). That vote was not automatic. See *United States v. Container Corp. of Am.*, 393 U.S. 333, 340 (1969) (Marshall, J., dissenting).
- ⁴⁰ 429 U.S. 477 (1977).
- ⁴¹ 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).
- ⁴² Marshall voted with the majority in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (antitrust injury requirement applies to private treble damage action against maximum resale price maintenance); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (strengthening evidentiary requirement for proving illegal resale price maintenance); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (extending Brunswick to private actions for injunctions); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (bolstering evidence needed to prove illegal resale price maintenance agreements).

⁴³ Students of decision making by appellate courts have documented how judges adjust their positions through discussions, negotiation, and bartering with colleagues. See ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 35-36, 345-47 (3d. ed. 1996); WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 56-58 (1964).

⁴⁴ Marshall's Papers indicate that some Justices used writings to convey information that one might expect them to transmit in conversation. In *Jefferson Parish*, Brennan sent Marshall a note about a draft of the majority opinion by Stevens:

Dear Thurgood,

My concerns that John might substantially depart from settled precedent have evaporated after reading his opinion. I therefore am inclined not to dissent but to join him. I don't want, however, to do that until you let me know your reaction. Will you at your earliest convenience?

Sincerely,

Bill

William J. Brennan, Jr., Letter to Thurgood Marshall Re: No. 82-1031—*Jefferson Parish Hospital District No. 2 v. Hyde* (Dec. 28, 1983), reproduced from Box 341, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. Marshall responded with a short written note. See Thurgood Marshall, Letter to William Brennan Re: No. 82-1031—*Jefferson Parish Hospital District No. 2 v. Hyde* (Jan. 31, 1984) ("As of now, the best I can do is to join in the judgment. I will, therefore, wait to see what comes forth."), reproduced from Box 341, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. Brennan was Marshall's closest friend on the Court. The use of written correspondence to make and respond to such inquiries suggests extensive reliance on writing to discuss positions on pending cases.

⁴⁵ Recent debate has focused extensively on how much Justice Blackmun delegated various analytical tasks to his law clerks. See David J. Garrow, *The Brains Behind Blackmun*, May/June 2005, *LEGAL AFFAIRS*, available at http://www.legalaffairs.org/issues/May-June-2005/feature_garrow_mayjune05.msp (reviewing Blackmun papers and concluding that he delegated excessive control over his official work to his law clerks). See also Tony Mauro, *Blackmun Clerks Had Too Much Power, Says Historian*, *LEGAL TIMES*, Aug. 18, 2005 (describing debate over Garrow's interpretation of Blackmun papers), available at <http://www.law.com/jsp/article.jsp?id=1113555914558>.

⁴⁶ 506 U.S. 447 (1993).

⁴⁷ 327 F.2d 459 (9th Cir. 1964).

⁴⁸ Undated Memorandum titled "Attachment Nos. 91-10, 91-32," reproduced from Box 608, Folder 4, of the Harry Blackmun Papers, Collections of the Manuscript Division, Library of Congress. The final page of the memorandum bears the signature "Molly." This indicates that the likely author of the memorandum was Molly McUsic, who clerked for Blackmun during the Court Term in question.

⁴⁹ 504 U.S. 451 (1992).

⁵⁰ On February 26, 1992, the law clerk wrote to Justice Blackmun:

Mr. Justice:

Re: Kodak, No. 90-1029

YIPPEE!!!! Justice Kennedy will join (if you make one change).

....

Isn't this wonderful? We actually won!

Memorandum from Molly [McUsic] to Justice Blackmun Re: Kodak, No. 90-1029 (Feb. 26, 1992), reproduced Papers of Harry Blackmun, Box 588, Folder 4, Collections of the Manuscript Division of the Library of Congress.

⁵¹ Bench Memorandum, *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, No. 83-2004 (Nov. 7, 1985), reproduced from Box 375, Folder 4, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. The final page of the bench memo bears the initials "PM," indicating that the memo's author is Paul Mahoney, who clerked for Marshall during the Court's 1985 term.

⁵² *Id.* at 6-7.

⁵³ On the Court's view of stare decisis as a limit on its resolution of antitrust cases, see *State Oil v. Khan*, 522 U.S. 3 (1997).

⁵⁴ 485 U.S. 717 (1988).

⁵⁵ 220 U.S. 373 (1911).

⁵⁶ On February 28, 1988, Justice Brennan told Justice Antonin Scalia: "I am in general agreement with your opinion but am concerned that some portions might be misread to suggest that the current validity of the per se rule against vertical price-fixing is in question, especially since the analysis nowhere sets forth that per se rule." Brennan went on to suggest clarifications that would resolve his concerns. William J. Brennan, Jr., Letter to Antonin Scalia Re: *Business Elec. v. Sharp Elec.*—No. 85-1910 (Feb. 28, 1988), reproduced from Box 439, Folder 5, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. Brennan eventually voted with the Court majority.

⁵⁷ Antonin Scalia, Letter to William Brennan Re: *Business Electronics Corp. v. Sharp Electronics Corp.*—No. 85-1910 (Feb. 29, 1988), reproduced from Box 439, Folder 5, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress. In his majority opinion, Scalia incorporated Brennan's suggestions to make clear that the Court in *Sharp* was not backing off the per se rule of liability established in *Dr. Miles*.

⁵⁸ Sandra Day O'Connor, Letter to John Paul Stevens Re: No. 82-1031—*Jefferson Parish v. Hyde* (Feb. 27, 1984), reproduced from Box 341, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.

⁵⁹ See Lewis F. Powell, Jr., Letter to John Paul Stevens Re: 82-1031—*Jefferson Parish Hospital v. Hyde* (Dec. 28, 1983) ("As you know, I have thought—both when practicing law and since coming to the Court—that the per se rule has been unwisely expanded. At least for me, the rule of reason—enabling judgments to be made on the basis of economic effects—is a far more sensible application of the Sherman Act in our free enterprise system. I therefore would be reluctant to join much of your opinion."), reproduced from Box 341, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress; William H. Rehnquist, Letter to John Paul Stevens Re: No. 82-1031—*Jefferson Parish Hosp. v. Hyde* (Jan. 4, 1984) ("I think this case offers an opportunity to cut back on the broad sweep of the per se prohibition against tying, and I am reluctant to join an opinion which passes up that opportunity, to say nothing of one which may broaden its sweep."), reproduced from Box 341, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress; Warren E. Burger, Letter to Sandra Day O'Connor Re: 82-1031—*Jefferson Parish Hospital v. Hyde* (Mar. 6, 1984) ("For many years I have resisted per se rules in this area and I conclude I will join Sandra's concurrence in the judgment."), reproduced from Box 341, Folder 5, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.

⁶⁰ See John Paul Stevens, Letter to Sandra Day O'Connor Re: 82-1031—*Jefferson Parish v. Hyde* (Feb. 27, 1984), reproduced from Box 341, Folder 6, of the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress.

⁶¹ *Jefferson Parish*, 466 U.S. at 32, 35 (O'Connor, J., concurring).

⁶² Compare *id.* at 37 n.16 (O'Connor, J., concurring) ("[A] patent holder has no market power in any relevant sense if there are close substitutes for the patented product."), with *id.* at 16 (Stevens, J.) ("[I]f the Government has granted the seller . . . a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power.").

⁶³ 126 S. Ct. 1281 (2006).

⁶⁴ *Id.* at 1293.

⁶⁵ *Id.* ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion").

⁶⁶ 495 U.S. 328 (1990) (private plaintiffs must show antitrust injury to recover damages from maximum resale price maintenance).

⁶⁷ 485 U.S. 717 (1988) (requiring that plaintiffs challenging resale price maintenance prove the existence of an agreement to set specific resale prices or price levels).